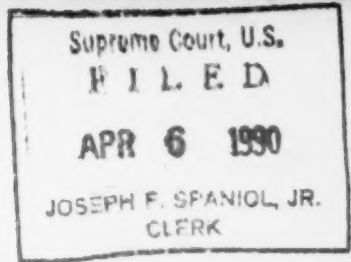


No. 89-1447



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

CROCKER NATIONAL BANK and
T.O.S. INDUSTRIES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT ON "QUESTIONS PRESENTED"

Crocker¹ and TOS² are dissatisfied with Ideco's³ "Questions Presented" and, under S.Ct. Rules 15.2 and 24.2, would state that the Questions do not arise from the circumstances of this litigation. Specifically, facts were not "assumed" by the district court, but rather were found by the court based upon undisputed evidence presented on cross-motions for summary judgment. Ideco did not factually rebut the summary judgment evidence of Crocker and TOS; it merely argued that a different legal conclusion should be made. The court of appeals, therefore, properly granted judgment for Crocker based upon established facts and law. Also, Ideco waived its right to a jury.

1. As required by S.Ct. Rule 29.1: Crocker National Bank is now known as Wells Fargo Bank, N.A. Its parent company is Wells Fargo & Company; it has no non-wholly owned subsidiaries. Respondent Crocker National Bank is identified as "Crocker" in this Brief.

2. As required by S.Ct. Rule 29.1: Respondent T.O.S. Industries, Inc. has no parent companies nor non-wholly owned subsidiaries. It is identified as "TOS" in this Brief.

3. Petitioner Ideco Division of Dresser Industries, Inc. is identified as "Ideco" in this Brief but, for clarification, has been referred to as "Ideco" or "Dresser" interchangeably in lower court practice.

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CORRECT CITATION OF OPINION BELOW

Ideco incorrectly cited the most recent Fifth Circuit opinion in this matter as 889 F.2d 1432. The correct cite is 889 F.2d 1452.

STATEMENT ON JURISDICTION

Ideco cited to 28 U.S.C. § 1241(1) as the basis for this Court's jurisdiction. As no such statute exists, Ideco has failed to plead a basis for Supreme Court jurisdiction.

CORRECT STATEMENT OF THE CASE

Ideco has omitted some facts and misstated others which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. This case involves a summary judgment on liability in an eight-year old dispute under Texas commercial law. The dispute concerns an unpaid seller of goods (Ideco) and a buyer's lender (Crocker) with a perfected security interest in goods delivered to the buyer (TOS).

Contrary to Ideco's assertions, the thirteen engines for which the court of appeals allowed Crocker to recover were always a subject of this litigation. Crocker's Original Complaint (Pet. App. G) sought recovery for certain listed items as well as "other collateral" taken from TOS by Ideco. TOS, in its Complaint in Intervention (App. A hereto) specifically listed and identified the thirteen engines which are the subject of this litigation. The engines were again specifically identified in Crocker and TOS' Amended Complaint (Pet. App. H). These identical engines were the subject of the first appeal. (See App. B

hereto). The Brief (App. p. B-2 hereto) referenced certain exhibits which listed the thirteen engines and described them by the same serial numbers as the Complaint in Intervention (App. A hereto) and the Amended Complaint (Pet App. H). Furthermore, the judgments of the district court and the court of appeals were based on the live pleadings and motions of Crocker and TOS and all related to the specifically identified thirteen engines. There is nothing in either opinion to suggest otherwise.

In response to both the first and second Motions for Summary Judgment filed by Crocker and TOS, Ideco chose not to controvert the evidence, including invoices and affidavits. This evidence included documents generated by Ideco itself. It was also undisputed that the engines were in fact (and not "apparently") delivered to a storage yard shared by TOS and Continental Drilling Company ("Continental"), an affiliate of TOS. The evidence conclusively established a relinquishment of possession by Ideco, but not by TOS. Thus, the district court's finding (Pet. App. p. B-3; 702 F.Supp. at 616), used by the court of appeals, of a sale to TOS, but not one by TOS, was apparent from the record. Furthermore, Crocker never admitted that a completed sale to Continental from TOS took place and, in any event, it was undisputed that Crocker never authorized the sale.

As the Fifth Circuit stated, "Ideco's contract was with TOS and it sent its invoices to TOS. TOS stored its inventory at the Owentown facility. When the engines were returned, TOS, not Continental, received the credit memoranda and the release. We are thus persuaded TOS, not Continental returned them." (Pet. App. p. A-5; 889 F.2d at 1453). It went on to note, again based on un-

controverted evidence, that "[t]he engines were delivered to TOS at Owentown and they were never moved. Continental never paid for them . . . But TOS transferred the engines back to Ideco." (Pet. App. p. A-6; 889 F.2d at 1454).

The district court's findings are not "assumed"; they are stated as found facts. For example, the district court found, from the uncontroverted summary judgment evidence, that "Ideco is the unpaid seller of the engines sold to TOS," that Ideco shipped the engines to a storage facility used by TOS and Continental, and that Ideco issued credit memoranda to, and executed a mutual release with, TOS. (Pet. App. p. B-3; 702 F.Supp. at 616, emphasis added). Ideco never complained of any facts, other than the value of the engines, found by the district court in its cross-appeal before the Fifth Circuit.

The Fifth Circuit noted in its first opinion (Pet. App. p. C-4; 839 F.2d at 1106), from which Ideco did not attempt an appeal, that "[i]n this case, the relevant facts are not disputed but the parties reach different legal conclusions on those facts." The case was remanded in that opinion for further development of the record concerning the relationship of Continental to TOS and Ideco. (Pet. App. p. C-4; 839 F.2d at 1109). The Fifth Circuit stated that "the crucial issue between the Seller [Ideco] and the Bank [Crocker] relates to whether or not the Seller retained a possessory interest in the goods." (Pet. App. p. C-12; 839 F.2d at 1109-1110).

On remand, undisputed evidence was presented showing that Continental was an affiliate of TOS and had no relationship with Ideco other than being the party to

which Ideco, in its wrongful exercise of control, ultimately sold the engines. Ideco admitted the fact of delivery of the engines on remand, on appeal and in oral argument before the Fifth Circuit. Ideco asserts that there was no evidence of its conversion; however, the record included invoices from Ideco evidencing the sale, and wrongful conversion thereby, of the engines from Ideco to Continental Drilling Company after Crocker's interest had attached. Its one remaining question having been answered, the Fifth Circuit rendered judgment for Crocker (App. p. A-2-3, 6; 889 F.2d at 1452, 1454) based upon the undisputed facts in the record before it. The Fifth Circuit did not conduct "a broad factual review" as postulated by Ideco, but rather rendered the judgment which the district court should have entered on the cross-motions for summary judgment.

* This case was presented to the district court for summary disposition by both parties. The evidence was fully developed through substantial written discovery and depositions. The facts, other than the value of the engines at the time of conversion, were not disputed. All that remained was for the court to apply the proper law and render judgment. The district court did so erroneously. Also, after an explicit waiver of a jury by Ideco (App. C hereto),⁴ the district court made a factual determination as to the value of the engines based on live testimony of experts from both sides. In its opinion (Pet. App. p. B-5; 702 F.Supp. at 617), the district court expressly stated that it was making the finding "to obviate another

4. A review of the referenced transcript will demonstrate that it was counsel for Ideco who made sure that the record was clear that it was waiving a jury.

remand." The holding of the district court that an unpaid seller which delivered goods to the inventory of a buyer had priority over a perfected secured creditor in the inventory of the buyer was properly reversed by the Fifth Circuit based on undisputed facts and well-established principles of law.

Thus, the district court did not "assume" facts, the court of appeals did not "find" facts and the Questions raised by Ideco in its Petition are not presented by this litigation. Both the district court and the court of appeals agreed that no further fact finding was necessary and that a summary disposition of the litigation was proper. They simply disagreed on what result the law required on those facts.

SUMMARY OF ARGUMENTS FOR DISALLOWING THE WRIT

Nothing presented in Ideco's Petition merits review by this Court. For example, Ideco seeks to raise complaints concerning the Amended Complaint of Crocker and TOS for the first time before this Court, despite the fact it never complained in any lower court. Ideco, Crocker and TOS presented the case for summary disposition and the proper, and seemingly final, result was a judgment for Crocker. The Fifth Circuit did not deprive Ideco of due process nor of its right to a jury. A review on writ of certiorari is not a matter of right, but of judicial discretion. S.Ct.R. 10. None of the circumstances outlined by Rule 10.1 exist in this case and there is no need for this Court to exercise its discretion.

ARGUMENT

IDECO WAS NOT DEPRIVED OF DUE PROCESS

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.; *Celotex Corp. v. Catrett*, 477 U.S. 316, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

"Ample due process safeguards are available in the summary judgment procedures of Rule 56." *Avia Group International, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). "A summary judgment reached in accordance with Federal Rule of Civil Procedure 56 . . . satisfies the requirements of due process." *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1044 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S.Ct. 1052, 98 L.Ed.2d 1014 (1988). On appeal from cross-motions for summary judgment, a court of appeals may reverse the summary judgment granted by the district court and render the judgment sought by the opposing party. *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986).

In response to a motion for summary judgment, the opposing party should marshal the evidence allowed under Rule 56(c), Fed. R. Civ. P., and demonstrate the existence of a genuine issue of material fact. Rule 56, Fed. R. Civ. P.; *Anderson*, 477 U.S. at 248-249, 106 S.Ct. at 2510. The adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Id.*; *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). If the adverse party believes the motion is premature and that further discovery is needed to develop evidence, Rule 56(f), Fed. R. Civ. P., provides a remedy. *Celotex*, 477 U.S. at 326, 106 S.Ct. at 2554. Thus, the time for Ideco to raise any factual issues or to complain of the need for more fact finding has long since passed. *Avia Group*, 853 F.2d at 1561.

All evidence and all issues were presented to the district court by the cross-motions for summary judgment. Ideco now seeks to raise complaints about evidence and issues before this Court which it failed to raise before the judgment was rendered for Crocker. All such arguments have been waived. *Gulf Union Industries, Inc. v. Formation Security, Inc.*, 842 F.2d 762, 765 (5th Cir. 1988). Generally, this Court will not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976).

For example, Ideco now raises the issue that a sale of the engines from TOS (but, apparently, somehow not from its inventory) to Continental occurred.⁵ However,

5. Crocker and TOS never "admitted" in their pleadings that the sale from TOS to Continental was completed. The undisputed evidence showed that Continental was never paid for the engines and, more importantly, that Crocker never approved of the sale.

it is undisputed that even if a sale occurred (and there was evidence, which Ideco chose not to controvert, that it did not), it was never disputed that Crocker did not approve of the sale as would be required for its security interest to become unperfected under the security agreement and Texas law. Furthermore, it was admitted by Ideco that it delivered the engines and, therefore, lost the perfection of its possessory security interest. Similarly, the issues regarding the status of the engines as inventory and the wrongful exercise of dominion and control by Ideco over the engines were presented, argued and briefed before the district court and the Fifth Circuit. A Petition for Writ of Certiorari should not be used to reopen litigation resolved by courts closer to, and more familiar with, the facts and state law involved. *See, Celotex*, 477 U.S. at 327, 106 S.Ct. at 2555.

Ideco also contends that it "always denied the formation of a contract for the sale of the engines" from it to TOS. However, it produced no evidence to factually rebut the invoices and affidavits demonstrating the sale and instead relied on its pleadings without explanation for the basis of its denial. This is not sufficient to defeat a summary judgment. *Anderson*, 477 U.S. at 248-249, 106 S.Ct. at 2510. Similarly, Ideco's claims that it always contested the issue of whether Crocker's security interest extended to the engines is based on its pleadings as it did not controvert Crocker's evidence and arguments on that issue. It did not plead or offer evidence or argument of ambiguity with respect to the language of the security agreement or the notices filed pursuant to the UCC.

A litigant is not deprived of a trial upon grant of a summary judgment "where the evidence of record at the

time of the motion supports its opponent on all key issues and the nonmovant fails to put in sufficient evidence to create a triable issue of any material fact." *Avia Group*, 853 F.2d at 1561. Where a full record, devoid of disputed material issues of fact, exists and where relevant legal issues have been fully briefed and argued, a court of appeals, in a case involving cross-motions for summary judgment, can properly deny the summary judgment granted by the district court and grant the opposing motion. *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980). "An appellate court may remand with directions to enter summary judgment on appellant's unsuccessful cross-motion for summary judgment where there is no dispute as to the facts which would justify judgment for the appellant." *First National Bank of Pennsylvania v. Lincoln National Life Ins. Co.*, 824 F.2d 277, 281 (3rd Cir. 1987). The foregoing authorities are precisely on point. The Fifth Circuit was presented with a simple commercial law dispute raised on cross-motions for summary judgment where all parties had notice and a full opportunity to present evidence and it properly reversed the judgment for Ideco and granted judgment for Crocker. *See, Id.*; *Joyner v. Dumpson*, 712 F.2d 770, 776 (2nd Cir. 1983).

Ideco was also clearly not deprived of procedural due process. "Procedural due process requires only adequate notice and an opportunity to be heard. *See generally, Board of Regents v. Roth*, 408 U.S. 564, 569-70 & n. 7, 92 S.Ct. 2701, 2705 & n. 7, 33 L.Ed.2d 548 (1972)." *Reid v. Egan*, 765 F.2d 1457, 1463 (9th Cir. 1985). Ideco has not complained of any lack of notice or

opportunity to be heard on Crocker's motion for summary judgment. That, in the arrogance of its position, it might not have taken full advantage of that opportunity is no basis for seeking relief from the Supreme Court of the United States.

It is important to note that even if the Fifth Circuit had decided factual issues, it would have been acting well within its authority. Any findings made were supported by undisputed evidence on issues which had been briefed and argued. Therefore, any findings were proper. *Shaw v. Federal Bureau of Investigation*, 749 F.2d 58, 63 (D.C. Cir. 1984); *Talley v. U.S. Postal Service*, 720 F.2d 505, 508 (8th Cir. 1983), *cert. denied*, 466 U.S. 952, 104 S.Ct. 2155, 80 L.Ed.2d 541 (1984).

IDECO WAS NOT DEPRIVED OF A JURY TRIAL

The right to a jury trial can be waived. *U.S. v. Moore*, 340 U.S. 616, 621, 71 S.Ct. 524, 527, 95 L.Ed. 582 (1951); *Cline v. Kaplan*, 323 U.S. 97, 99, 65 S.Ct. 155, 156, 89 L.Ed. 97 (1944). For example, participation in a bench trial constitutes a waiver. *Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1019 (2nd Cir. 1989); *U.S. v. 1966 Beechcraft Aircraft*, 777 F.2d 947, 950 (4th Cir. 1985). Similarly, failure to object to a bench trial amounts to a waiver. *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112, 116 (5th Cir. 1987); *Allen v. Barnes Hospital*, 721 F.2d 643, 644 (8th Cir. 1983).

Ideco makes the convoluted argument that because it claims some fact issues exist which somehow bar a summary judgment for Crocker, but not for Ideco, that the granting of summary judgment for Crocker tread upon

its right to a jury. However, a summary judgment procedure does not amount to denial of a right to trial. *Avia Group*, 853 F.2d at 1561. Ideco itself moved for summary judgment. The district court granted that motion and determined that a summary disposition of the entire case was proper since it determined, after a bench trial, the one genuine issue of material fact which could possibly prevent a summary judgment for Crocker. The Fifth Circuit also determined that a summary disposition was proper based upon the cross-motions and the history of the litigation.

Furthermore, Ideco waived its right to a jury trial. "The right to a jury trial . . . may be waived, and in a civil case a waiver is shown by mere acquiescence, when a party or his counsel is present and not objecting." *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949), *cert. denied*, 338 U.S. 816, 70 S.Ct. 57, 94 L.Ed. 494 (1949). At the final hearing before the district court on the motions for summary judgment, the court indicated that it would proceed with a summary disposition of the case and liquidate the value of the engines. Counsel for Ideco pointed out that "one or both" parties had demanded a jury and that he wanted to make sure that the record was clear. (App. C hereto). The court then stated, "I'm not a jury. I'm going to decide that issue. *Hearing no objection*, everything is all right, all right. Thank you, counsel." (App C hereto, emphasis added). Once a party has withdrawn his demand for a jury trial, even at the strong suggestion of the trial judge, he may not change his mind. *Hanlon v. Providence College*, 615 F.2d 535, 538-539 (1st Cir. 1980); *see also*, *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1432 (7th Cir. 1986). A

first complaint about a bench trial comes too late on or after an appeal. *In re Muller*, 851 F.2d 916, 920 (7th Cir. 1988), *cert. denied sub nom.*, *Rogers v. First National Bank*, ____U.S.____, 109 S.Ct. 1645, 104 L.Ed. 2d 160 (1989).

CONCLUSION AND PRAYER

Ideco, Crocker and TOS twice presented this case to the district court for summary disposition based upon voluminous written discovery, depositions and affidavits. Twice the parties fully briefed and argued the issues to the district court and court of appeals. The Fifth Circuit resolved the ancient litigation based upon a completely developed record, undisputed facts and cross-motions for summary judgment. It is now too late for Ideco to reopen this litigation and raise issues it chose not to raise in response to a motion for summary judgment. This conversion case involving the commercial law of the State of Texas was properly resolved on cross-motions for summary judgment and no issue involved rises to the constitutional level suggesting intervention by this Court. Ideco's attempt to create such an issue is contrived. Even if the Court desired to limit the scope of *Celotex* and *Anderson* and restrict summary judgment practice, as Ideco invites, this litigation does not present any circumstances for doing so. Therefore, Crocker and TOS

respectfully pray that Ideco's Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with S.Ct. Rules 15.2 and 29.3, I hereby certify that three true and correct copies of the foregoing Brief have been forwarded to:

Robert Hayden Burns
James R. O'Donnell
Kevin Risley
Jeannette McAllister
Butler & Binion
1600 First Interstate Bank Plaza
Houston, Texas 77002

by first class United States certified mail, return receipt requested, this the _____ day of April, 1990. As required by S.Ct. Rule 29.5, a separate Proof of Service is being filed herewith.

STEPHEN R. KIRKLIN

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-2988

CROCKER NATIONAL BANK, and
T.O.S. INDUSTRIES, INC. d/b/a
TEXAS OILFIELD SUPPLY,
Debtor in Possession,
Plaintiffs

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant

(Filed August 17, 1988)

COMPLAINT IN INTERVENTION

COMES NOW, T.O.S. INDUSTRIES, INC. d/b/a TEXAS OILFIELD SUPPLY, a Texas corporation, debtor in possession in Chapter 11 reorganization proceedings presently pending in the United States Bankruptcy Court, Southern District of Texas, Houston Division, under Case No. 82-02295-H2-5, as Plaintiff, complaining of the IDECO Division of Dresser Industries, Inc. ("DRESSER"), Defendant, and in support of this Complaint in Intervention states the following:

I.

Jurisdiction in this Civil Action is based on 28 U.S.C. § 1331, and 11 U.S.C. §§ 547, 549. The matter in con-

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troversy, exclusive of interest and costs, exceeds the sum of \$10,000.00 (Ten Thousand Dollars) and arises under the laws of the United States.

II.

On August 10, 1982, T.O.S. Industries, Inc. d/b/a Texas Oilfield Supply ("TOS"), filed a petition under Chapter 11 of Title 11 of the United States Code. Since such filing TOS has acted, and now acts, as debtor in possession, with all the rights and powers of a trustee appointed under Title 11 of the United States Code.

III.

DRESSER, from time to time has sold goods to TOS, including drilling rigs and related accessory products. Such goods were sold to TOS for resale by TOS or to be held by TOS for sale or lease to its customers. TOS became heavily indebted to DRESSER in amounts which apparently exceeded \$10,000,000.00.

IV.

DRESSER made arrangements with TOS for the collection of the indebtedness owed by TOS to DRESSER. Pursuant to these arrangements, on or about July 12, 1982, in cancellation of indebtedness owed by TOS to DRESSER, TOS transferred drilling rigs and related accessory products ("the Goods") to DRESSER out of the TOS inventory. Such TOS transfers to DRESSER on or about July 12, 1982, included the following:

- (a) TOS transferred to DRESSER rig components and accessory products under Sales Return No. D1/

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B0091 through D1/B0091-6. The components are described and have serial numbers as follows:

SCR System	
UTB-360-5-42 Block	370
LR-275 Rotary	683
TL-300 Swivel	280
2 Caterpillar D-398 Power Units	35Z01139
	35Z01140
1 Caterpillar D-379 Power Unit	34Z00864
ED-1200 Hoist	227
Dretech Model 3550 Brake	8116
2 GE-752 Electric Motors	7544015
	7544168

TOS was issued a credit memorandum for return of the components in the total amount of One Million, Four Hundred One Thousand, One Hundred Sixteen and No/100 Dollars (\$1,401,116.00).

- (b) TOS transferred to DRESSER rig components and accessory products described under Sales Return No. D1/B0128 through D1/B0128-7. The components are described and have serial numbers as follows:

1 Foster Model 24-AH Breakout Cathead	1876
1 Foster Model 37-AH Spinning Cathead	1555
LR-275 Rotary	581
1 Caterpillar D-399 Power Unit	36Z01204
1 Caterpillar D-398 Power Unit	35Z01143
Caterpillar D-379 Power Unit	34Z00866
SCR System	
E-1700 Hoist	MM245
Dretech Model 5250 Brake	8086
2 GE-752 Electric Motors	7543866
	7544055

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TL-400 Swivel	181
UTB-525-6-50 Block	630
2 T-1300 Pumps	199, 204
2 T-1300 Pump Drives	967, 968
4 GE-752 Electric Motors	7543852
	7543881
	7544122
	7543916

TOS was issued a credit memorandum for the return of the above referenced components in the amount of Two Million, Three Hundred Thirty-One Thousand, Three Hundred Twelve and No/100 Dollars (\$2,331,312.00).

- (c) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0093 through D1/B0093-5. The components are described and have serial numbers as follows:

UTB-360-5-42 Block	369
2 Caterpillar D-398 Power Units	35Z01141
	35Z01142
1 Caterpillar D-379 Power Unit	34Z00865
SCR System	
LR-275 Rotary	619
TL-300 Swivel	287
ED-1200 Hoist	229
Dretech Model 3550 Brake	8087
2 GE-752 Electric Motors	7544117
	7544090
1 Foster Model 37-AH Spinning	1574
Cathead	
1 Foster Model 24-AH Breakout	1960
Cathead	

TOS was issued a credit memorandum for return of the above referenced components in the total amount of One Million, Four Hundred Seven Thousand, One

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Hundred Ninety and No/100 Dollars (\$1,407,190.-00).

- (d) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0094 through D1/B0094-5. The components are described and have serial numbers as follows:

UTB-360-5-42 Block	371
SCR System	—
2 Caterpillar D-398 Power Units	35Z01223
	35Z01227
1 Foster Model 37-AH Spinning Cathead	1407
1 Foster Model 24-AH Breakout Cathead	2122
1 Caterpillar D-379 Power Unit	34Z00938
TL-300 Swivel	289
ED-1200 Hoist	230
Dretech Model 3550 Brake	8139
2 GE-752 Electric Motors	7544088
	7544099

TOS was issued a credit memorandum for the return of the above referenced components in the total amount of One Million, Three Hundred Thirty-Three Thousand, Eight Hundred Ninety-Eight and No/100 (\$1,333,898.00).

- (e) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0096 through D1/B0096-6. The components are described and have serial numbers as follows:

UTB-360-5-42 Block	219
SCR System	—
LR-275 Rotary	634
TL-300 Swivel	292
2 T-1000 Pumps	MI-269
	JS-192

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Pump Gages, Valves, Puls. Damp. Pullers	—
2 T-1000 Pump Drives	923, 924
2 GE-752 Electric Motors	—
2 Caterpillar D-398 Power Units	35Z01322
	35Z01323
1 Caterpillar D-379 Power Unit	34Z00939

TOS was issued a credit memorandum for the return of the above referenced components in the total amount of One Million, Five Hundred Fifty-Four Thousand, Five Hundred Fifty-Six and No/100 Dollars (\$1,554,556.00).

- (f) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0130 through D1/B0130-4. The components are described and have serial numbers as follows:

SCR System	
LR-275 Rotary	624
TL-400 Swivel	190
1 Foster Model 37-AH Spinning Cathead	1414
1 Foster Model 24-AH Breakout Cathead	1872
1 Caterpillar D-399 Power Unit	36Z01497
1 Caterpillar D-398 Power Unit	35Z01324
Caterpillar D-379 Power Unit	34Z00941
E-1700 Hoist	MM-249
Dretech Model 5250 Brake	8109
2 GE-752 Electric Motors	7544005
	7540123

TOS was issued a credit memorandum for the return of the above referenced components in the total amount of One Million, Four Hundred Thirty-Five Thousand, One Hundred Ninety and No/100 Dollars (\$1,435,190.00).

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- (g) TOS transferred to DRESSER Caterpillar Packaged Electric Sets described in Sales Return Nos. D1/A0644-8, D1/A0645-8, D1/A0642-7 and D1/A0643-8. The components are described and have serial numbers as follows:

Caterpillar D-399 Packaged

Electric Set

Cat D-399 Engine	35B06578
KATO Generator	84425-4
O & M Radiator	130-263

Caterpillar D-398 Packaged

Electric Set

Cat D-398 Engine	66B09262
KATO Generator	84426-10
O & M Radiator	129-191

Caterpillar D-379 Packaged

Electric Set

Cat D-379 Engine	34Z00784
KATO Generator	84426-19
O & M Radiator	129-231

Caterpillar D-399 Packaged

Electric Set

Cat D-399 Engine	35B06584
KATO Generator	94425-5
O & M Radiator	128-834

Caterpillar D-399 Packaged

Electric Set

Cat D-399 Engine	35B6582
KATO Generator	86612-1
O & M Radiator	128-836

Caterpillar D-398 Packaged

Electric Set

Cat D-398 Engine	66B9263
KATO Generator	84426-11
O & M Radiator	129-192

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Caterpillar D-379 Packaged	
Electric Set	
Cat D-379 Engine	34Z786
KATO Generator	84426-12
O & M Radiator	129-232
Caterpillar D-398 Packaged	
Electric Set	
Cat D-398 Engine	66B9230
KATO Generator	84426-16
O & M Radiator	129-005
Caterpillar D-398 Packaged	
Electric Set	
Cat D-398 Engine	66B9271
KATO Generator	84426-17
O & M Radiator	129-008
Caterpillar D-379 Packaged	
Electric Set	
Cat D-379 Engine	34Z774
KATO Generator	84426-18
O & M Radiator	128-973
Caterpillar D-398 Packaged	
Electric Sets	
Cat D-398 Engine	66B9272
KATO Generator	84426-2
O & M Radiator	129-007
Caterpillar D-398 Packaged	
Electric Sets	
Cat D-398 Engine	66B9273
KATO Generator	84426-3
O & M Radiator	129-006
Caterpillar D-379 Packaged	
Electric Sets	
Cat D-379 Engine	34Z783
KATO Generator	84426-20
O & M Radiator	128-972

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TOS was issued credit memoranda for the return of the above referenced components in the total amount of One Million, Seven Hundred and Eight Thousand, One Hundred and Twenty-Seven and No/100 Dollars (\$1,708,127.00).

V.

TOS, as debtor in possession, has not determined all the details or the extent of the arrangements DRESSER made with TOS for collection of its claims against TOS, but these details are well known to DRESSER and will be discovered by Crocker National Bank, the original plaintiff in this Civil Action.

AVOIDANCE OF PREFERENTIAL TRANSFER

TOS, as debtor in possession, is entitled to recover from DRESSER all of the goods transferred to DRESSER out of the TOS inventory. Such transfers were made to DRESSER as a creditor of TOS, for or on account of antecedent debt owed by TOS before such transfers were made, while TOS was insolvent, made on or within 90 days before the date of the filing by TOS of its petition under Title 11 of the United States Code, the effect of such transfer enabling DRESSER to receive more than it should receive if, in a case under Chapter 7 of Title 11 of the United States Code the transfer had not been made and DRESSER had received payment of its debt to the extent provided by the provisions of Title 11 of the United States Code. Accordingly, TOS as debtor in possession, may void, and hereby seeks avoidance of such transfer under the provisions of 11 USC § 547(b).

DETERMINATION OF SECURITY INTEREST

Any retention or reservation by DRESSER of title to the goods was to secure payment or performance of TOS's indebtedness to DRESSER. As a matter of law, the only interest of DRESSER in the goods is a security interest that is not perfected as required by law and is not enforceable against TOS as debtor in possession pursuant to the provisions of 11 USC § 544, 1107. TOS, as debtor in possession, is entitled to a determination and judgment that its powers and rights to the goods transferred are, pursuant to Title 11, first, prior and superior to any claims held by DRESSER to the goods.

TOS, as debtor in possession, has not yet asserted, but may later assert, other claims against DRESSER, including but not limited to, claims for the value of the goods. TOS, as debtor in possession, therefore reserves its right to amend this Complaint after it has discovered what DRESSER has done with the goods.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, TOS Industries, Inc., d/b/a Texas Oilfield Supply, as debtor in possession, prays that upon trial the Plaintiff have judgment for recovery of all of the goods in the possession of the defendant, the IDECO Division of Dresser Industries, Inc., for the value of any of the goods converted to the use or benefit of the IDECO Division of Dresser Industries, Inc., and a declaration by this Court that the claim of TOS, as debtor in possession, to the goods is first, prior and superior to any claim of the IDECO Division of Dresser Industries, Inc. and for such other and further relief, general and special, at law

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or in equity, to which Plaintiff may show itself justly entitled.

Respectfully submitted,

/s/ FRANK R. MONROE
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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2634

CROCKER NATIONAL BANK n/k/a
WELLS FARGO BANK and
T.O.S. INDUSTRIES, INC.,
Appellants,

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Appellee.

Appeal from the United States District Court
for the Southern District of Texas

CORRECTED BRIEF FOR THE APPELLANTS

TIM S. LEONARD
ANN SPIEGEL
KIRKLIN, BOUDREAUX
& JOSEPH
1800 InterFirst Plaza
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(713) 757-0000

Attorneys for Appellants
Crocker National Bank n/k/a
Wells Fargo Bank and
T.O.S. Industries, Inc.

merely as bailee for TOS, did not hold a perfected security interest in the goods. Ideco is only the holder of an unperfected security interest which is inferior to the interest of Crocker, a secured creditor with a perfected security interest in the rigs and is also inferior to Crocker as good faith purchaser for value. Further, Ideco's alleged perfected purchase money security interest in the rigs would be subordinate to Crocker's perfected security interest since Ideco failed to give Crocker the notification required by § 9.312(c) prior to TOS' constructive possession of the goods. With regard to the control units and engines, Ideco clearly did not have a perfected security interest in these goods since Ideco did not have possession of these goods. The control units were manufactured and remained at the Ross Hill Company and never were in Ideco's possession. Ideco transferred possession of the engines to TOS care of a third party by shipping the engines to Continental Drilling Company. (Vol. 1, p. 24; Exhibits 1, 2, 3, and 4 to Deposition of Bradford). Thus, Crocker's prior perfected security interest in the control units and engines is unquestionably superior to Ideco's unperfected security interest in these goods.

C. *Case Law Applicable To Legal Questions Raised.*

In *Interfirst Bank of Abilene v. Lull Manufacturing*, 778 F.2d 228, 229 (5th Cir. 1985), this Court was faced with the issue of whether a Bank's perfected security interest in the after-acquired property of the purchaser attached to a forklift upon delivery and thereby rendered the Bank's interest . . .

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-2988

CROCKER NATIONAL BANK

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.

OCTOBER 24, 1988
4:10 P.M.

HEARING ON MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE LYNN HUGHES

APPEARANCES:

For the Plaintiff:

Mr. Charles Kirklin
Mr. Tim Leonard
Mr. Bob Ward

For the Defendant:

Mr. James R. O'Donnell

Court Reporter

Linda D. Williams

Proceedings recorded by mechanical stenography,
transcript produced by note reading.

MR. O'DONNELL: I don't think it is probably the thing to do. I think it is—I don't know what the law is on this. I think one or both of us demanded a jury. If we are going to decide that issue without a jury, I think we ought to be explicit about it.

THE COURT: I'm not a jury. I'm going to decide that issue. Hearing no objection, everything is all right, All right. Thank you, counsel.

MR. KIRKLIN: Thank you, Judge. Appreciate it.

(Proceedings concluded at 5:07 p.m.)

APPENDIX D

RULE 56, FED. R. CIV. P.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon

the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

